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HOME INSURANCE COMPANY, Plaintiff, vs. CORNELL-DUBILIER ELECTRONICS, INC., et al, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY Civil Action Docket No. MER-L-5192-96

CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF EXXON MOBIL CORPORATION'S MOTION FOR SUMMARY JUDGMENT AGAINST THE LONDON MARKET INSURERS ON INDEMNITY WITH RESPECT TO THE EXXON LONDON POLICIES

Pursuant to Rule 4:46-2 of the New Jersey Rules Governing Civil Practice, Exxon Mobil Corporation ("Exxon") respectfully submits this Concise Statement of Undisputed Material Facts in support of its Motion for summary Judgment Against the London Market Insurers ("LMI") on Indemnity with Respect to the Exxon London Policies.

1. On or about December 19, 1996, Home Insurance Company ("Home") commenced this litigation as a declaratory judgment action against Federal Pacific Electric Company ("FPE"), its former subsidiary, Cornell-Dubilier Electronics, Inc. ("CDE"), and 29 of their other insurers, including "Certain Underwriters of Lloyd's." In 1997, Home served and filed its First Amended Complaint. *See* Toriello Cert., Exh. D.

The Exxon London Policies

2. From January 1, 1979 through December 31, 1983, LMI issued a series of excess insurance policies of general liability to "Exxon Corporation and its Affiliated Company" and/or reinsurance to Exxon's captive insurer, Ancon Insurance Company ("Ancon") (collectively hereinafter, the "Exxon London Policies"). Toriello Cert., ¶ 16.

3. All of the Exxon London Policies contained substantially identical arbitration clauses providing for arbitration in New York:

> "In the event of any difference arising between the Insured and the Insurers with reference to this Insurance such difference shall at the request of either party (after all requirements of this insurance with respect to recovery of any claim shall have been complied with) be referred to three disinterested arbitrators . . .."

Toriello Cert., Exh. ¶ 16, Exh. M.

4. The Exxon London Policies also provided that,

> "Any such arbitration shall take place in New York, N.Y. unless otherwise agreed by both parties, and the expense of the arbitration shall be borne and paid as directed by the arbitrators. The arbitrators may abstain from jurisdictional formality ***and from following strictly the rules of law***."

Id. (emphasis added).

5. In 2000, Exxon and the LMI entered into a settlement agreement concerning the Exxon London Policies, which provided for indemnification of certain claims of Exxon's former affiliates under certain circumstances ("2000 Settlement Agreement"). Heckman Cert., ¶ 2, Exh. A. During this time, the LMI never disclosed to Exxon the existence of the then-pending CDE claims. *Id.* at ¶ 3.

6. The indemnity provisions of the 2000 Settlement Agreement made no reference to the CDE claims then-pending against the LMI in New Jersey, or any other pre-existing claims generally. Heckman Cert., ¶¶ 3-5.

7. The 2000 Settlement Agreement, as drafted, contemplates indemnity only for future claims. Heckman Cert, ¶ 5.

8. In addition, the indemnity under the 2000 Settlement Agreement was limited to claims "arising out of the POLICIES and relating to ENVIRONMENTAL LIABILITY." Heckman Cert., Exh. A at ¶ 4.1. The indemnity did not indemnify the LMI for their own negligence or misconduct. Heckman Cert., ¶ 9; Exh. A at ¶ 4.

9. The 2000 Settlement Agreement also provided that, "Inasmuch as any claims identified under Paragraph 4.1 may affect the rights and interests of all PARTIES, the PARTIES shall consult and act in good faith in responding to and defending against such claims." Heckman Cert., ¶ 6; Exh. A at ¶ 4.2.

10. The 2000 Settlement Agreement further provided that it would be construed according to New York law. Heckman Cert., Exh. A at ¶ 10.2.

11. In 1998 in response to Home's commencement of the instant action, CDE filed crossclaims against the LMI. Toriello Cert., ¶ 5, Exh. E. CDE's crossclaims were amended in 2002. *Id.* at ¶ 6, Exh. F. In each case, CDE sought a declaration that the LMI policies covered CDE's environmental liability at specified sites, including South Plainfield. *Id.* at ¶ 7.

12. The LMI did not assert their right to arbitrate claim disputes in their Answer to CDE's Crossclaim and Amended Crossclaim. *See* Toriello Cert., ¶ 8, Exh. G; ¶ 9; Exh. K at 31-32.

13. In addition, the LMI did not consult and work with Exxon in responding to CDE's claims under the Exxon London Policies, as is required under Paragraph 4.2 of the 2000 Settlement Agreement, until March 2009, by which time the litigation had been pending for thirteen years. *See* Heckman Cert., ¶¶ 7-8, Exh. B.

14. On or about May 28, 1999, CDE served interrogatories and document requests on the LMI asking them to identify and produce all liability policies issued by the LMI at any time in which either CDE or FPE was a named insured, an additional insured, or otherwise a covered party (such as a shareholder or subsidiary). Toriello Cert., Exh. H at 3.

15. The LMI did not produce the Exxon London Policies in response to CDE's 1999 requests. *Id.*

16. On or about June 7, 2006, CDE served a second request for production that requested responsive liability insurance policies that had not yet been produced. *Id.*

17. Again, the LMI did not produce the Exxon London Policies in response to CDE's 2006 requests. *Id.*

18. On or about June 2007, the LMI retained Exxon and Ancon's former lead underwriter, Peter Wilson, who had been responsible for negotiating the Exxon London Policies. Despite having withheld the Exxon London Policies from CDE all this time, the LMI provided Mr. Wilson with copies of these policies for his review. CDE eventually discovered these policies in November 2008, while reviewing Mr. Wilson's expert certification in preparation for his deposition. *See* Toriello Cert., Exh. H at 3-4.

19. Upon discovery of the Exxon London Policies in November 2008, CDE objected to the LMI's failure to have produced these policies earlier in the litigation. Toriello Cert., Exh. K at 22. Even then, the LMI did not notify Exxon of the claims asserted by CDE in 1992 and 1998 against the Exxon London Policies. *See* Heckman Cert., ¶ 7.

20. On or about January 7, 2009, CDE filed a motion for sanctions against the LMI based on their failure to produce or to identify the Exxon London Policies until this late stage in the litigation ("CDE's Sanctions Motion"). Toriello Cert., Exh. H at 4.

21. The LMI first notified Exxon of CDE's claims against the Exxon London Policies and certain "motions pending that impact the Exxon London Policies" in March 2009, some thirteen years after the litigation commenced and almost nine years after the 2000 Settlement Agreement was executed. Heckman Cert., ¶¶ 7-8; Exh. B.

22. Exxon refused to defend the LMI against CDE's Sanctions Motion because the motion sought sanctions from the LMI for bad faith discovery and the indemnity provided for under the 2000 Settlement Agreement did not indemnify the LMI for their own negligence or misconduct. *See* Heckman Cert., ¶ 9.

23. The Honorable Andrew J. Smithson, J.S.C granted CDE's Sanctions Motion in an Order and Opinion filed on June 23, 2009: "[T]his court finds that the LMI should have known that the Exxon policy existed after diligent discovery, and a failure to provide this policy amounts to a failure to 'partake in the discovery process in good faith.'" Toriello Cert., Exh. H at 10.

24. Upon learning of CDE's intention to file its motion for summary judgment on a claim for coverage under the Exxon London Policies, Exxon conditionally agreed to defend the LMI under a reservation of rights with respect to any ultimate indemnity liability and intervened in the case. *See* Heckman Cert., ¶ 10; Toriello Cert., Exhs. I-J. As explained in the May 11, 2010 and June 21, 2010 letters from Exxon's counsel to the LMI's counsel, Exxon's agreement to defend under a reservation of rights did not waive its right to dispute its obligation to indemnify the LMI. *See* Toriello Cert., ¶ 13.

25. Exxon immediately thereafter asserted the right to arbitration under the Exxon London Policies and argued on behalf of the LMI to arbitrate CDE's claim dispute and to stay the litigation. *See* Toriello Cert., Exh. K at 18-19, 30. Prior to that time, however, the LMI had never asserted any right to arbitration. *Id.* at 19, 31-32.

26. Despite Exxon's efforts to stay litigation and to arbitrate the underlying dispute, the Honorable Douglas H. Hurd ruled that notwithstanding the Exxon London Policies' mandatory arbitration provision, the LMI had waived the right to arbitrate because CDE's claims against those policies had been pending for 14 years. Toriello Cert., Exh. K at 11, 30-32. The Court further ruled that the LMI's failure to assert their right to arbitrate for fourteen (14) years was simply too long a delay, as the longest delay ever allowed by a New Jersey court was limited to five (5) years into the litigation. *See Id.*

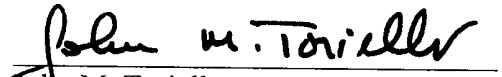
27. Exxon, as indemnitor, sought leave to appeal Judge Hurd's decision, but its request was denied by the Appellate Division on December 9, 2010 on essentially the same grounds articulated by Judge Hurd. Toriello Cert., Exh. L.

28. In opposition to CDE's motion for summary judgment against the LMI with respect to the Exxon London Policies, Exxon submitted extensive evidence attesting to the circumstances surrounding the issuance of these policies. CDE's insurance matters were handled by Ron Stolle, who provided testimony through certification that the parties intended for CDE to be covered only by the Ancon policy, not the Exxon London Policies ("Stolle Certification"). Tom Chasser, Ancon's representative, and Peter Wilson, the lead underwriter for the LMI, both provided similar testimony in their individual certifications (the "Chasser Certification" and the "Wilson Certification", respectively). In other words, both the insurers and the insured agreed that the Exxon London Policies were never intended to provide direct coverage to CDE. These affiants also explained that the Exxon London Policies were issued in conjunction with Exxon's worldwide insurance program and were intended to act only as reinsurance for Ancon, Exxon's captive insurer, when Ancon issued a direct policy to Exxon or one of its affiliates. The Ancon policy, not the Exxon London Policies, was intended to operate as direct insurance for Exxon affiliates like CDE. *See* Toriello Cert., ¶¶ 17-19.

29. In connection with its claim seeking a declaratory judgment as to coverage under certain insurance policies in connection with various environmental claims involving CDE and FPE, Home named 29 insurers as defendants in this action, plus a reservation for additional unidentified insurers. Toriello Cert., Exh. D, ¶ 34. Several insurers settled these claims even before CDE answered the Amended Complaint. Toriello Cert.. Exh. E at ¶ 3 of CDE's Crossclaims. On information and belief, the remaining insurers/defendants, including Home, also settled with CDE, except for the LMI, Allstate Insurance Company, as sole successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, CNA (comprised of Columbia Casualty Company and Continental Casualty Company), and United Insurance Co.

Dated: March 2, 2011

Respectfully submitted,

By: 

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